No. 14-981

IN THE

Supreme Court of the United States

ABIGAIL NOEL FISHER,

Petitioner,

v.

UNIVERSITY OF TEXAS AT AUSTIN, et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF THE COLLEGE BOARD, AACRAO, NACAC, AND LSAC *AMICI CURIAE*, SUPPORTING RESPONDENTS

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF *AMICI CURIAE*	1
SUMMARY OF THE ARGUMENT	3
ARGUMENT	4
I. THE CONTINUING SUCCESS OF AMERICA'S SYSTEM OF HIGHER EDUCATION DEPENDS IN PART ON INSTITUTIONS HAVING THE ABILITY TO DEFINE AND PURSUE DISTINCT MISSIONS AND EDUCATIONAL GOALS, WITHIN APPROPRIATE PARAMETERS	4
II. HOLISTIC REVIEW IS A ROBUST, ESSENTIAL STRATEGY PURSUED BY MANY INSTITUTIONS OF HIGHER EDUCATION TO ADMIT STUDENT BODIES THAT CAN FULFILL MISSION-DRIVEN INSTITUTIONAL GOALS	8
A. The admissions process is an essential exercise of institutional autonomy	8
B. Holistic review is a common, rigorous, and data-driven process, guided by well-developed evaluation systems and informed by professional judgment in undergraduate, graduate, and professional school admissions—that has been sanctioned by decades of Court decisions	11

TABLE OF CONTENTS—Continued

Page

C. Many institutions consider race and ethnicity in a limited but important way as part of the holistic review process, consistent with this Court's precedent 21

D. The Court should preserve decades of workable precedent associated with race-conscious practices that the higher education community has relied upon and integrated into their policies and practices 26

CONCLUSION 28

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133 S. Ct. 2411 (2013) 21-22, 26, 27

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INTEREST OF *AMICI CURIAE*[1]

Amici collectively represent the membership of the four national organizations: three that provide policy, practice, and professional development leadership for America's undergraduate admission professionals, and one that does so for law school admission officers.

Founded in 1900, the **College Board** is a mission-driven not-for-profit organization that connects students to college success and opportunity. Today, its membership includes more than 6,000 of the world's leading educational institutions dedicated to promoting excellence and equity in education. Each year, the College Board helps more than seven million students prepare for a successful transition to college through programs and services in college readiness and college success—including the SAT® and the Advanced Placement Program®. The organization also serves the education community through research and advocacy on behalf of students, educators, and schools.

Founded in 1910, the **American Association of College Registrars and Admissions Officers (AACRAO)** is a non-profit, voluntary, professional association of more than 11,000 higher education professionals who represent approximately 2,600 institutions in more than 40 countries. Its mission is to provide professional development, guidelines, and voluntary standards to be used by higher education officials regarding the best practices in records

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amici curiae* or their counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief.

management, admissions, enrollment management, administrative information technology, and student services. AACRAO represents institutions in every part of the higher education community, from large public institutions to small, private liberal arts colleges.

Founded in 1947, the **Law School Admission Council (LSAC)** is a nonprofit corporation devoted to facilitating and enhancing the admissions process for more than 200 law schools in the United States, Canada, and Australia. LSAC sponsors and publishes research about law school admissions in addition to administering the Law School Admission Test (LSAT).

Founded in 1937, the **National Association for College Admission Counseling (NACAC)** is a nonprofit education association of more than 15,000 secondary school counselors, independent counselors, college admissions and financial aid officers, enrollment managers, and organizations that work with students as they make the transition from high school to postsecondary education.

All Amici have a longstanding commitment to ensuring equal educational opportunities for all students. All help lead and support the College Board's Access and Diversity Collaborative, established in 2004, which provides guidance and a wide range of resources to colleges, universities, and state systems of higher education in developing and implementing access- and diversity policies and practices that comply with the law. *See* Coll. Bd., *Access & Diversity Collaborative*, http://diversitycollaborative.collegeboard.org (last visited Oct. 27, 2015).

SUMMARY OF THE ARGUMENT

America's higher education system is the envy of the world. To continue as academic, economic, and civic engines for excellence, colleges and universities must be able to define and pursue their education missions and education goals, within appropriate parameters. Admitting classes of students that are best able to contribute and succeed is a vital exercise of institutional identity and autonomy because mission is achieved through the student bodies institutions admit and educate.

Holistic review is a cornerstone of the admission process for many institutions of higher education. While institutions adapt elements of holistic review to satisfy their particular institutional goals, they all rely on a set of well-established, common norms and practice. They include: documented admission criteria; consideration of a mix of many academic and non-academic factors to evaluate individual applicants in line with institutional goals; a team-based, multi-staged review process that includes both quantitative and qualitative review, as well as attention both to each applicant and to the overall makeup of the admitted class; ongoing evaluation of outcomes; and integration within a broader enrollment process that involves related, often race-neutral recruitment, outreach, and financial aid initiatives.

For some institutions, consideration of an applicant's race and/or ethnicity serves a limited but important role in holistic review—consistent with decades of this Court's precedent. The consideration of race or ethnicity in light of other elements in a student's application may provide unique opportunities for applicants to convey their experiences and for admissions professionals to make more contextualized, informed decisions.

Precluding consideration of race and ethnicity would, for many institutions, undermine their ability to consider every relevant facet of an individual applicant and to achieve the institution's broader goals.

This Court's longstanding precedents recognize institutional autonomy and agency in admissions, while demanding that no applicant faces discrimination based on his or her race or ethnicity. Prior decisions provide clear, workable rules for institutions to continue to follow as they seek to achieve their goals for themselves, their students, and our nation in non-discriminatory ways.

ARGUMENT

I. THE CONTINUING SUCCESS OF AMERICA'S SYSTEM OF HIGHER EDUCATION DEPENDS IN PART ON INSTITUTIONS HAVING THE ABILITY TO DEFINE AND PURSUE DISTINCT MISSIONS AND EDUCATIONAL GOALS, WITHIN APPROPRIATE PARAMETERS.

The U.S. system of higher education, embodied by its heterogeneity and autonomy, is home to the world's leading universities[2] and is world renowned.

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[2] American universities represent 17 of the top 25 universities in the Times Higher Education World University Rankings 2015-2016 based on teaching, research, knowledge transfer and international outlook, Times Higher Education, *World University Rankings*, https://www.timeshighereducation.com/world-university-rankings/2016/world-ranking (last visited Oct. 27, 2015); 11 of the top 25 universities on the QS Top University Rankings 2015-16, based on research, teaching, graduate employability, internationalization, facilities, online/distance learning, social responsibility, innovation, arts & culture, inclusiveness, and specialist criteria, QS Top Universities, *World University*

More than 4,700 American degree-granting institutions, serve over 20 million undergraduate and graduate students. THOMAS SNYDER & SALLY DILLOW, U.S. DEP'T OF EDUC., DIGEST OF EDUCATION STATISTICS 2013 57 tbl.105.50, 377, *available at* http://nces.ed.gov/pubs2015/2015011.pdf.

The strength of the American higher education system draws large and growing numbers of students from across the globe. In 2014, American institutions enrolled approximately 900,000 international students—20 percent of all international students worldwide and over 200,000 more than U.S. institutions hosted in 2001. INST. OF INT'L EDUC., PROJECT ATLAS: TRENDS AND GLOBAL DATA 2014 (2015), *available at* http://www.iie.org/~/media/Files/Services/ProjectAtlas/Website%202014/Project-Atlas-Trends-and-Global-Data-2014.pdf.

Many factors account for the success and renown of America's higher education system. Critical among them are the "unique mix of private and public institutions and the highly decentralized character of the entire enterprise." WILLIAM G. BOWEN, MARTIN A. KURZWEIL, & EUGENE M. TOBIN, EQUITY AND EXCELLENCE IN HIGHER EDUCATION 68 (2005). "An important reason why American higher education has become preeminent in the world is the greater willingness of the government to respect the autonomy of colleges and universities." WILLIAM G. BOWEN & DEREK BOK, THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY

Rankings 2015/16, http://www.topuniversities.com/university-rankings/world-university-rankings/2015 (last visited Oct. 27, 2015).

ADMISSIONS 287 (2d prtg. 2000);[3] *see also* David F. Labaree, *A System Without a Plan: Emergence of an American system of higher education in the twentieth century*, 3 INT'L J. HISTORIOGRAPHY EDUC. 46 (2013) (concluding that market forces and autonomy significantly contributed to American higher education's current level of "global reach and broad esteem"). The heterogeneity and autonomy that characterize the American higher education system have provided key incentives for innovation, experimentation, and economic development. DEREK BOK, HIGHER EDUCATION IN AMERICA 22 (2013). As "the most productive in terms of research, knowledge production and distribution, and training of high-level personnel," America's higher education system "naturally has influence worldwide." PHILIP ALTBACH, COMPARATIVE HIGHER EDUCATION 55 (1998).

Defining mission and educational goals is one of the "complex educational judgments" that lie "primarily within the expertise of the university." *Grutter v. Bollinger*, 539 U.S. 306, 328 (2003). These judgments that inform institutional direction rest upon a mix of complex strategic decisions designed to enhance student, faculty, and broader institutional potential and educational achievement.

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[3] The "decentralized, diverse, and highly competitive nature of higher education in this country" has had "a major impact on economic performance through time." It has "allowed 'the system' to avoid the pitfalls of forced homogeneity and associated inefficiencies. Different kinds of institutions . . . have been able to serve the widely varying needs (and preferences) of multiple clienteles. This variegated structure, combined with this country's historical commitment to freedom of expression, has allowed students and faculty members to think creatively and independently." BOWEN, KURTZWEIL, & TOBIN, *supra*, at 68.

Institutions' academic freedom and autonomy is not unfettered, however. Institutions are complex organizations governed by founding documents, boards of trustees, institutional leaders, and faculty members. Faculty members' participation in institutional governance is a notable manifestation of this academic freedom that has been endorsed by this Court. *Tilton v. Richardson*, 403 U.S. 672, 681-82 (1971) (citing with approval the 1940 Statement of Principles on Academic Freedom and Tenure developed by the American Association of University Professors and the American Association of Colleges and Universities and still in operation today); *see also* WILLIAM A. KAPLIN & BARBARA A. LEE, THE LAW OF HIGHER EDUCATION, § 1.3.2. Internal governance (5th ed. 2012). Multiple governing regimes effectively balance elements of institutional accountability while valuing institutional autonomy, including the external peer-review evaluation that is a core element of institutional accreditation.[4]

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[4] Accreditation is a periodic, externally led, peer-review evaluation of institutional quality that includes a full review of recruiting and admissions practices, among other facets of institutional policy and practice. Institutions must be accredited by federally-recognized accreditors as a condition for eligibility to receive federal financial aid. 4 C.F.R. § 602.16; *see also* NAT'L ASS'N FOR COLL. ADMISSION COUNSELING, REFERENCE GUIDE: REGIONAL ACCREDITATION STANDARDS RELATED TO ADMISSION AND RECRUITMENT (2014).

II. HOLISTIC REVIEW IS A ROBUST, ESSENTIAL STRATEGY PURSUED BY MANY INSTITUTIONS OF HIGHER EDUCATION TO ADMIT STUDENT BODIES THAT CAN FULFILL MISSION-DRIVEN INSTITUTIONAL GOALS.

Holistic review is a cornerstone of the admission process, adopted by a large number of heterogeneous institutions that provides a rigorous framework to allow colleges and universities to make individualized admissions decisions in the context of educational goals and as a natural extension of institutional mission.

A. The admission process is an essential exercise of institutional autonomy.

In schools large and small, urban and rural, research and land-grant (and more), admission decisions are grounded in the unique history, character, aims, and vision that define an institution.[5] *See* Jerome A. Lucido,

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[5] Moreover, differences *within* institutions—between undergraduate and graduate/professional programs and among schools within undergraduate institutions—also have distinct missions that affect admissions. As with the application of strict scrutiny by federal courts, "context matters." *Grutter*, 539 U.S. at 327. What works for one institution (or professional school within an institution) in light of its mission and processes will not necessarily work for another. *See, e.g.*, AMY N. ADDAMS ET AL., ASS'N OF AM. MED. COLL., ROADMAP TO DIVERSITY: INTEGRATING HOLISTIC REVIEW PRACTICES INTO MEDICAL SCHOOL ADMISSION PROCESSES ix-x (2010) (discussing mission alignment and application of holistic review practices in medical school settings).

Professional schools often use holistic review to assess how well the applicant will contribute to the institution's educational goals *and* to broader workforce goals within the relevant sector. American law schools, for instance, pursue "selection of students based upon intellectual ability and personal potential for success

How Admission Decisions Get Made, *in* HANDBOOK OF STRATEGIC ENROLLMENT MANAGEMENT 147, 148-49 (Don Hossler & Bob Bontrager eds., 2015); GRETCHEN W. RIGOL, COLL. BD., ADMISSIONS DECISION-MAKING MODELS 1 (2003), *available at* http://www.collegeboard.com/prod_downloads/press/adm_decision_making.pdf [hereinafter "COLL. BD., ADMISSIONS MODELS"] ("There are almost as many different approaches to selection as there are institutions.").

Institutions routinely adapt holistic review to make it their own, as a natural extension of institutional mission and a tool to achieve the institution's educational goals. *E.g.*, Princeton Univ., Compl. No. 02-08-6002 (U.S. Dep't of Educ. Sept. 9, 2015) (compliance resolution), *available at* https://www.ed.gov/about/offices/list/ocr/docs/investigations/02086002-a.pdf; Rice Univ., Compl. No. 06-05-2020 (U.S. Dep't of Educ. Sept. 10, 2013) (compliance resolution), http://www.ed.gov/about/offices/list/ocr/docs/investigations/06052020-a.html (last modified Jan. 14, 2015); *see also* ARTHUR L. COLEMAN ET AL., COLL. BD., DIVERSITY ACTION BLUEPRINT: POLICY PARAMETERS AND MODEL PRACTICES FOR HIGHER EDUCATION INSTITUTIONS 15 (2010), *available at* http:// diversitycollaborative.collegeboard.org/sites/default/files/document-library/10b_2699_diversity_action_blueprint_web_100922.pdf [hereinafter "COLL. BD., DIVERSITY BLUEPRINT"] (discussing and illustrating pursuit of mission-related goals through admissions practices); ADDAMS ET AL., *supra* note 5, at

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in the study and practice of law, through a fair and nondiscriminatory process designed to produce a diverse student body and a broadly representative legal profession." ASS'N OF AM. LAW SCHS., BYLAWS AND EXECUTIVE COMMITTEE REGULATIONS PERTAINING TO THE REQUIREMENTS OF MEMBERSHIP § 6-1 ("Core Values") at (b)(v).

ix-x (discussing the alignment of mission related goals with holistic review processes in medical admissions.).

Because institutions realize their mission-oriented goals through the intellectual and personal experiences and pursuits of their students, they take great care in creating entering classes. Decisions are shaped by governing boards, presidents, and faculty members alike.[6] As then-President Shirley Tilghman, explained to Princeton's class of 2009 on their first day: "Never again will you live with a group of peers that was expressly assembled to expand your horizons and open your eyes to the fascinating richness of the human condition." Princeton Univ., Compl. No. 02-08-6002, *supra*, at 6. Institutions take that responsibility seriously, as

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[6] The governance of American institutions of higher education "is based on the idea of a community of scholars and shared governance." ALTBACH, *supra*, at 62. In this regard, faculty help shape admission policy directions, and participate in the admissions process itself. *See Grutter*, 539 U.S. at 314-15 (observing that the University of Michigan Law School's admission policy reflected "unanimous adoption of [a faculty] committee's report by the Law School faculty" to become "the Law School's official admissions policy"); Rice Univ., Compl. No. 06-05-2020, *supra* (describing the role of a Faculty Council, working with other university officials, to modify Rice's admission policy); GRETCHEN W. RIGOL, COLL. BD., SELECTION THROUGH INDIVIDUALIZED REVIEW 17 (2004), *available at* https://research.collegeboard.org/sites/default/files/publications/2012/7/misc2004-2-selection-through-individualized-review.pdf [hereinafter "COLL. BD., INDIVIDUALIZED REVIEW"]; GRETCHEN W. RIGOL, COLL. BD., BEST PRACTICES IN ADMISSIONS DECISIONS 15 (2002), *available at* https://research.collegeboard.org/sites/default/files/publications/2012/7/misc2002-1-best-practices-admissions-decisions.pdf; Michele Sandlin, *The "Insight Resume:" Oregon State University's Approach to Holistic Assessment*, *in* THE COLLEGE ADMISSIONS OFFICER'S GUIDE 99, 103 (Barbara Lauren ed., 2008) (discussing faculty role in creating new admissions model).

evidenced by the systemic rigor that characterizes the admission process.

B. Holistic review is a common, rigorous, and data-driven process, guided by well-developed evaluation systems and informed by professional judgment in undergraduate, graduate, and professional school admissions—that has been sanctioned by decades of Court decisions.

For most selective institutions, the "ultimate aim of the admissions process" is "finding the best balance of students with different academic interests, different talents and skills, and different background characteristics." COLL. BD., ADMISSIONS MODELS, at 7. Though many admissions models exist, holistic review is one of the most common, particularly among selective undergraduate, graduate, and professional programs.[7] *See* COLL. BD., ADMISSIONS MODELS at 9; ADDAMS ET AL., *supra*. Holistic review has grown in use over the last several decades, driven by the need to make more nuanced decisions among an ever-growing applicant pool. *See, e.g.*, URBAN UNIVS. FOR HEALTH, HOLISTIC ADMISSIONS IN THE HEALTH PROFESSIONS: FINDINGS FROM A NATIONAL SURVEY 11-12 (Sept. 2014), *available*

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[7] A 2012 study of enrollment officials revealed that 76 percent of all participating institutions and 92 percent of more selective institutions reported using holistic review in their admission process. Those institutions also reported that pursuit of holistic review was effective in achieving institutional goals. LORELLE ESPINOSA, MATTHEW GAERTNER, & GARY ORFIELD, AM. COUNCIL ON EDUC., RACE, CLASS, AND COLLEGE ACCESS: ACHIEVING DIVERSITY IN A SHIFTING LEGAL LANDSCAPE 31-32 (2015), *available at* https://www.acenet.edu/news-room/Documents/Race-Class-and-College-Access-Achieving-Diversity-in-a-Shifting-Legal-Landscape.pdf.

at http://urbanuniversitiesforhealth.org/media/documents/Holistic_Admissions_in_the_Health_Professions.pdf; Memorandum from the Comm. On Admissions, Enrollment, and Preparatory Educ. to the Univ. of Cal., Berkeley, Academic Senate, Freshman Admissions Policy Fall 2016, at 1 (Apr. 14, 2015), *available at* http://academic-senate.berkeley.edu/sites/default/files/committees/division/meetings/enclosure_2_-_admissions_enrollment_report_4-22-15.pdf ("As Berkeley has become more selective in its undergraduate admissions, it has become imperative that processes allow for higher resolution and greater flexibility in assessing the applicants' qualifications, reaching beyond the UC mandated application data. In the context of these changes, it is important to reaffirm the centrality of holistic review as the organizing tool for the review of applications.").

The starting point for holistic review is always the institution's own context. Lucido, *supra*, at 148-49; MELISSA CLINEDINST, NAT'L ASS'N FOR COLL. ADMISSION COUNSELING, STATE OF COLLEGE ADMISSION 28 (2015), *available at* http://www.nxtbook.com/ygsreprints/NACAC/2014SoCA_nxtbk/. Specific considerations may include: unique mission characteristics and goals, academic approach and philosophy, non-academic programs, financial resources, and the likely "yield" of admitted students, to name a few. Lucido, *supra*, at 147-49; CLINEDINST, *supra*, at 31. Because each institution's holistic review process is derived from these mission-specific objectives and considerations, no two institutions will have exactly the same holistic

review process,[8] but several key practices are characteristic of holistic review models.

First, holistic review is a flexible framework that allows for the institution-specific consideration of a range of intersecting factors to make individualized admissions decisions. Admissions professionals review an application to understand and assess the applicant, his or her accomplishments, and his or her potential to succeed and contribute to the institution's community.[9]

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[8] *See, e.g.*, Brief for Amherst Coll. et al. as Amici Curiae Supporting Respondents at 9-12, Gratz v. Bollinger, 539. U.S. 244 (No. 02-516), Grutter v. Bollinger, 539 U.S. 309 (No. 02-241) (discussing the range of factors considered by small, highly-selective schools and identifying 12 categories of factors relied upon by Amherst in its quest to "assess each student's likely success and contribution"); Brief for Carnegie Mellon Univ. et al. Amici Curiae Supporting Respondents 4a-5a, Gratz v. Bollinger, 539. U.S. 244 (No. 02-516), Grutter v. Bollinger, 539 U.S. 309 (No. 02-241) (including amicus Belmont University's statement affirming its commitment to diversity as a foundation of its role as "a Christian community of learning and service"); Belmont Univ., *Degree Seeking Admissions: Admissions considerations*, http://www.belmont.edu/catalog/undergrad2015jun/admis_finan/entering/degree_seek.html (last visited Oct. 23, 2015) (listing multiple categories of criteria considered, and stating "Applicants are considered on the total picture that a student's credentials present . . . No two applicants will present the same credentials or the same degree of 'fit' with the university.").

[9] Detailed applications submitted by students include transcripts, high school profiles, standardized test scores, essays, and letters of recommendation. Some institutions also require separate materials for specialized programs or scholarships. Others are starting to introduce new measures to add depth to the traditional file, including assessments of "non-cognitive" abilities, *see* William E. Sedlacek, *Noncognitive Measures for Higher Education Admissions*, *in* INT'L ENCYC. OF EDUC. 845 (Penelope Peterson et al. eds., 3d ed., 2010), and portfolios of academic work starting in ninth grade, *e.g.*, Press Release, Coal. for Access, Affordability,

Academic factors represent only one dimension of the ultimate decision to admit. Lucido, *supra*, at 151-56; COLL. BD., ADMISSIONS MODELS, at 19-20. Multiple sources confirm the wide range of non-academic factors that can affect an admission decision. The College Board's landmark Admissions Models Project, for example, identified nearly 30 academic factors and almost 70 non-academic factors, including:

Academic Achievement, Quality, and Potential

- Direct Measures (e.g. class rank, core curriculum grades, test scores)
- Caliber of High School (e.g., average SAT scores, competitiveness of class, percentage attending 4-year colleges)
- Evaluative Measures (e.g., artistic talent, evidence of academic passion, intellectual curiosity, grasp of world events)

Non-Academic Characteristics and Attributes

- Geographic (e.g., academically disadvantaged school, economically disadvantaged region, from far away, school with few or no previous applicants)
- Personal background and attributes (e.g., cultural diversity, first generation to go to college from family, personal disadvantage, unrepresented minority, civic awareness, concern for others, creativity, determination/grit, evidence of persistence, maturity)

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and Success, *Diverse group of universities form coalition to improve college admission process* (Sept. 28, 2015), *available at* http://www. coalitionforcollegeaccess.org/press-release.pdf.

- Extracurricular activities, service and leadership (e.g., awards and honors, community service, work experience)
- Extenuating circumstances (e.g., family problems, health challenges, frequent moves, responsibility for raising a family)

COLL. BD., ADMISSIONS MODELS at App. D. More recent studies affirm these conclusions. *See, e.g.*, ESPINOSA, GAERTNER, & ORFIELD, *supra* note 7 (reporting results of undergraduate admission survey inquiring about 19 admission factors); ADDAMS ET AL., *supra* note 5, at 9-10 (describing an "Experiences, Attributes, and Metrics" model recommended for individual medical school policy development, with a collection of 26 factors that may be considered).

The various institutional interests that drive consideration of certain factors by admission officers do not, as some contend, merely result in a separate weighting or consideration of factors in isolation. For example, factors like character and perseverance manifest and are assessed based on multiple elements of an application. *See, e.g.*, Sandlin, *supra* note 6, at 99-108 (describing Oregon State University's application process that requires answers to six questions designed to measure eight "noncognitive variables" as part of its unique holistic review process); Brief for Amherst Coll. et al., *supra* note 8, at 9-12.

Additionally, admission officers typically examine the context relevant to the applicant in making judgments that are, by definition, not susceptible to formulaic decision-making. Admissions officers, for instance, will read files not only for how a student represents him or herself—but also how the student took advantage of available opportunities. Lucido, *supra*, at 157 ("Given

unequal educational opportunity, it is incumbent upon admission evaluators to strive to understand the conditions under which each applicant has performed and to make judgments based on the context of those conditions."). A student who took one AP course at her elite urban high school with dozens of AP options, for example, might well be considered differently than a student who took the only AP class available at his rural or under-resourced school.[10]

The second key element of the holistic review model is reliance on rigorous processes that leverage professional experience, expertise and judgment, as well as ensure consistency and fairness.

Effective holistic review practices include the participation of multiple, well trained individuals who bring significant experience and expertise to the decision-making process. *See* COLL. BD., INDIVIDUALIZED REVIEW, at 17-18, 21-22. Though significant variation exists in institutions' processes,[11] applications routinely go

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[10] As the University of Maryland explains, "Our admission committee is comprised of a team of professionals who undertake an individualized, rigorous and holistic review of each application, assessing academic merit, achievements and potential, in the context of the opportunities and challenges the student faced." Univ. of Md., *Admission Philosophy*, https://www.admissions.umd.edu/requirements/AdmissionPhilosophy.php (last visited Oct. 23, 2015).

[11] As a leading admissions expert has explained:

> Application reading assignments are made in a number of ways. Some institutions have staff members read by expertise, which may mean reading all applications from a particular recruitment territory or all applications to a particular program (engineering, for example). Other institutions prefer to have applications for admission assigned to readers randomly. As the applications move forward in the process, a second reader may read the

through multiple levels of review that involve different admissions personnel. Typically, applications are assigned to initial readers, who make a preliminary recommendation to admit, defer, or deny. Lucido, *supra*, at 162-63. The application is then further evaluated by an admissions committee or a second reader (who repeats the process without knowing the first reader's assessment). *Id.* These reviews often include numerical assessment on multiple ratings scales and/or decision indices, along with written summaries of the applicant's accomplishments, personal characteristics, and ability to contribute to the college community.

Then, after each application is evaluated anywhere from one to three times to reach a preliminary individualized decision, admissions leaders then start the final decision process. At this stage, the composition of the class and how it meets institutional goals plays a significant role. Teams of admissions leaders and senior managers must work through "a complex calculus" across a broad set of considerations including academic quality, tuition revenue, heterogeneity in its many forms, and support for academic and non-academic programs. *Id.* at 163. Also, any special student body demographics or characteristics need to be addressed. Notre Dame, for example, aims for 80 percent of its

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> application 'blind,' or without knowing the evaluation of the first reader, and then assign a second set of ratings. Alternatively, a second reader may 'read behind' a first reader to validate the ratings and make a second judgment. Should readers vary in their judgments, a senior reader or an admission committee will make a judgment on the file. Other decision mechanisms include bringing all rated files to a full committee review, where a staff or a team of readers can vote on the file."

Lucido, *supra*, at 162-63.

student body to be Catholic. Univ. of Notre Dame, *Admission Statistics*, http://admissions.nd.edu/apply/admission-statistics/ (last visited Oct. 27, 2015). Public institutions seek to serve a broad cross section of students throughout their states. And, institutions work to ensure they have adequate representation of different groups of students to avoid "tokenism" (the pressure and stress that can result from feeling like the only representative of a particular group on campus). *See, e.g.*, Kellina M. Craig & Karen E. Feasel, *Do Solo Arrangements Lead to Attributions of Tokenism? Perceptions of selection criteria and task assignments to race and gender solos*, 28 J. APPLIED SOC. PSYCH. 1810 (1998); Laurie L. Cohen & Janet K. Swim, *The Differential Impact of Gender Ratios on Women and Men: Tokenism, self-confidence, and expectations*, 21 PERSONALITY & SOC. PSYCH. BULL. 876 (1995); Janice D. Yoder, *Looking Beyond Numbers: The effects of gender status, job prestige, and occupational gender typing on tokenism processes*, 57 SOC. PSYCH. Q. 150 (1994).

The third key element of successful holistic review practice is the regular evaluation of predictive validity, as admissions officers work to improve their outcomes year to year. Admissions factors can be shown to correlate with measures of college persistence, including in traditional measures such as grades and test scores as well as emerging measures related to contribution, leadership, and other "non-cognitive" factors. E.g., NEAL SCHMITT ET AL., COLL. BD., DEVELOPMENT AND VALIDATION OF MEASURES OF NONCOGNITIVE COLLEGE STUDENT POTENTIAL (2011), *available at* https://research.collegeboard.org/sites/default/files/publications/2012/7/researchreport-2011-1-validation-measures-noncognitive-college-student-potential.pdf; JENNIFER L. KOBRIN ET AL., COLL. BD., REP. NO. 2008-5, VALIDITY OF THE SAT FOR PREDICTING FIRST-YEAR

COLLEGE GRADE POINT AVERAGE (2008), *available at* https://professionals.collegeboard.com/profdownload/Validity_of_the_SAT_for_Predicting_First_Year_College_Grade_Point_Average.pdf. Importantly, institutions conduct their own validity studies because the impact of different elements and variables can vary from campus to campus. JOHN W. YOUNG WITH JENNIFER L. KOBRIN, COLL. BD., REP. NO. 2001-6, DIFFERENTIAL VALIDITY, DIFFERENTIAL PREDICTION, AND COLLEGE ADMISSION TESTING: A COMPREHENSIVE REVIEW AND ANALYSIS (2001), *available at* https://research.collegeboard.org/sites/default/files/publications/2012/7/researchreport-2001-6-differential-validity-prediction-college-admission-testing-review.pdf; Lucido, *supra*, at 151.

Finally, holistic review in admissions must also be understood in its full context: holistic review is typically part of a larger "enrollment management" process that also involves outreach, recruitment, and financial aid efforts of the institution, among others. *See generally* HANDBOOK OF STRATEGIC ENROLLMENT MANAGEMENT (Don Hossler & Bob Bontrager eds., 2015). Institutions prepare for admissions by building strong applicant pools; studying trends in application, admission, yield, and retention and graduation over time; and working to ensure that the pool of admitted students is likely to become the desired group of enrollees.

The vast majority of enrollment efforts that complement holistic review are race-neutral. They confer no individual benefit on students based on their race or ethnicity. *See Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 788-89 (2007) (Kennedy, J., concurring in part and concurring in the judgment) (observing that education leaders who work to bring together students of diverse backgrounds and races

by recruiting them "in a targeted fashion" and by "tracking enrollments, performance, and other statistics by race" do not engage in efforts that lead to different treatment based on race, so "it is unlikely any of them would demand strict scrutiny to be found permissible."). Through strategic recruitment and outreach, close relationships with high schools, deft use of technology, and a clear sense of institutional identity, institutions endeavor to interest and attract a wide range of potential students through multi-faceted, inclusive recruitment and outreach efforts. *See* ESPINOSA, GAERTNER, & ORFIELD, *supra* note 7, at iii; JAMIE L. KEITH ET AL., AM. ASS'N. FOR THE ADVANCEMENT OF SCI., HANDBOOK ON DIVERSITY AND THE LAW, APPENDIX A (rev. 2014), *available at* http://www.aaas.org/sites/default/files/RevisedAppendixA_2014_Summary%20and%20Highlights%20of%20the%20Handbook%20on%20Diversity%20and%20the%20Law.pdf; ARTHUR L. COLEMAN ET AL., COLL. BD., THE PLAYBOOK: A GUIDE TO ASSIST INSTITUTIONS OF HIGHER EDUCATION IN EVALUATING RACE- AND ETHNICITY-NEUTRAL POLICIES IN SUPPORT OF THE MISSION-RELATED DIVERSITY GOALS (2014), *available at* http://diversitycollaborative.collegeboard.org/sites/default/files/document-library/adc-playbook-october-2014.pdf [hereinafter "COLL. BD., PLAYBOOK"] (describing array of race-neutral recruitment and outreach strategies). And, through financial aid and scholarship awards, institutions seek to create pathways for low income students of all races to attend, and to recognize outstanding students for their special talents or contributions.

The U.S. Department of Education's Office for Civil Rights' (OCR) 2013 review of Rice University's admissions policies in response to a complaint of discrimination illustrates this point. In its investigation, OCR found that Rice used recruitment and financial aid

awards to seek out students who "distinguished themselves through initiatives that build bridges between different cultural, racial and ethnic groups" and pursued dozens of race-neutral outreach and recruitment efforts, such as recruitment trips to "non-feeder" high schools and direct mail and telemarketing to expand outreach to underrepresented students. Rice Univ., Compl. No. 06-05-2020, *supra*.

In sum, though institutions make holistic review their own, all models include institutionally specific, criterion-driven evaluation, multiple application reviews, a combination of individualized review and attention to the composition of a mix of students in a class, and data-driven measurement and evaluation of outcomes.

C. Many institutions consider race and ethnicity in a limited but important way as part of the holistic review process, consistent with this Court's precedent.

As part of the rigorous holistic review process outlined above, many colleges and universities include race and ethnicity as one consideration among many. Indeed, this individualized decision-making that was first approved by Justice Powell in *Bakke* has served for decades as a polestar for federal courts, the federal executive branch, and enrollment officials. *See, e.g.*, *Grutter*, 539 U.S. at 323; U.S. DEP'TS OF JUSTICE & EDUC., GUIDANCE ON THE VOLUNTARY USE OF RACE TO ACHIEVE DIVERSITY IN POSTSECONDARY EDUCATION (2011), *available at* http://www.ed.gov/about/offices/list/ocr/docs/guidance-pse-201111.pdf; U.S. DEP'T OF EDUC., NOTICEOF FINAL POLICY GUIDANCE, NONDISCRIMINATION IN FEDERALLY ASSISTED PROGRAMS, 59 Fed. Reg. 8756 (Feb. 23, 1994) (citing *Bakke* as foundation for permissible institutional financial aid

policy development); U.S. DEP'T OF EDUC., POLICY INTERPRETATION ON USE OF RACE IN POSTSECONDARY ADMISSIONS, ANALYZING THE *BAKKE* DECISION, 44 Fed. Reg. 58,509 (Oct. 10, 1979). And this Court has continued to build on *Bakke* over time, including through its decision in *Fisher I* just two years ago. *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411 (2013) (relying upon language of *Bakke* throughout); *see also Parents Involved*, 551 U.S. at 793 (Kennedy, J., concurring in part and concurring in the judgment) ("[In *Grutter*], the Court sustained a system that, it found, was flexible enough to take into account 'all pertinent elements of diversity,' 539 U.S., at 341 (internal quotation marks omitted), and considered race as only one factor among many, *id.*, at 340.") Pursuant to this Court's authorities, so long as considerations of race and ethnicity do not "'insulat[e] the individual from comparison with all other candidates for the available seats," *Grutter* at 334 (quoting *Bakke* at 438 U.S. 317) (internal quotation marks omitted), race or ethnicity may serve as a "plus" factor in an applicant's file, as part of the holistic review process.[12]

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[12] The fact that limited consideration of race and ethnicity may be warranted does not provide institutions with *carte blanche* to use race and ethnicity however they see fit, as Petitioner and some of her amici seem to suggest. Pet. Br. 4, 48; Brief for Ctr. for Individual Rights as Amicus Curiae Supporting Petitioner at 8-12, Fisher v. Univ. of Tex. at Austin (No. 14-981). As Chief Justice Rehnquist made clear in *Gratz*, "Nothing in Justice Powell's opinion in *Bakke* signaled that a university may employ whatever means it desires to achieve the stated goal of diversity without regard to the limits imposed by our strict scrutiny analysis." 539 U.S. 244, 275 (2003). Court precedents establish clear markers that limit considerations of race and ethnicity in holistic review, including:

Institutions that consider race and/or ethnicity as part of the process of admission do so in line with broader efforts to develop a full understanding of individual applicants. For those institutions, an applicant's race or ethnicity may have influenced who they are, what they have achieved, and what they may contribute. As noted by the Harvard plan appended to Justice Powell's *Bakke* opinion, "[T]he critical criteria are often individual qualities or experience not dependent upon race but sometimes associated with it." 438 U.S. at 324.

This point has been illustrated in several institutional contexts. For example, the Harvard Plan, cited by Justice Powell in *Bakke* as a manifestation of this principle, 438 U.S. at 316-19, 321-24, was also discussed with approval by this Court in *Grutter*, 539 U.S. at 335-39, and in *Gratz*, 539 U.S. at 272-73. In corresponding fashion, the University of Michigan Law School policy upheld in *Grutter* illustrated this key principle through its descriptions of actual admission decisions.[13] Other amicus briefs filed by

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- Race and ethnicity cannot be used pursuant to some point system where they are mechanically weighted as part of the admission process; *Gratz*, 539 U.S. at 272-73.
- Admission decisions involving the consideration of race or ethnicity may not result in the admission of "virtually every underrepresented minority applicant." *Id.* at 271-72.
- Admission decisions may not racially type students or otherwise label students solely based on their race or ethnicity. *Parents Involved*, 551 U.S. at 788-90, 797-98.

[13] One example from the University of Michigan Law School:

> Z had a 3.99 GPA from the University of Florida and a 41 (90th percentile) LSAT. She has majored in Political Science, with three minors: Classics, Economics and Latin

institutions of higher education reflect holistic review practices in line with this principle, as well.[14]

Correspondingly, in its review of Princeton University's holistic review process this year, the OCR summarized the more general principles in play at Princeton regarding its consideration of race in holistic review—fully in line with this Court's precedent:

> [D]uring the University's admissions process, an applicant's race and national origin—if he or she offered that information—may or may not be considered, depending upon whether that information provides further context about an individual applicant. For example, an admissions officer might consider how race may have figured in the context of where a person was born, where a person grew up, and where he or she had gone to school. Race and national origin may also be considered if an

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American Studies. The daughter of two Greek immigrants, she has been immersed in a significantly ethnic home life. She has traveled to Greece during the summers, but also has studied in Spain and the Netherlands. She is fluent in English, Greek and Spanish. Her personal statement and essay are both well written and provocative, and her faculty references extremely strong. This candidate's credentials bring her within the range of applicants from which we make a reasonable number of offers. Her file illustrates how diversity considerations may considerably strengthen good but not exceptional numerical credentials.

COLL. BD., DIVERSITY BLUEPRINT, at 29.

[14] *E.g.*, Brief for Mass. Inst. Tech. et al. as Amici Curiae Supporting Respondents at 23, n.47, Gratz v. Bollinger, 539 U.S. 244 (No. 02-516), Grutter v. Bollinger, 539 U.S. 309 (No. 02-241); Brief of Amherst Coll. et al., *supra* note 8 (as discussed with approval in Grutter, 539 U.S. at 323 and at 390-92 (Kennedy, J., dissenting)).

> applicant brings up those subjects in his or her essay.

Princeton Univ., Compl. No. 02-08-6002, *supra*, at 10.[15]

As Princeton's practices reflect, the consideration of race or ethnicity in holistic review does not reduce "an individual to an assigned racial identity." *Parents Involved*, 551 U.S. at 795 (Kennedy, J., concurring in part and concurring in the judgment). In fact, the opposite is true. Admissions professionals work to understand the whole student and actively encourage applicants to tell their unique story relevant to institutional interests. *See* BOWEN & BOK, *supra*, at 286 (regarding the use of race in admissions, observing that "there is much to be said for allowing different institutions to come to different conclusions as to what is the right approach *for them*"). For some students, race or ethnicity may play an important role.[16]

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[15] *See also* Univ. of N.C., Compl. No. 11-07-2016 (U.S. Dep't of Educ. Nov. 27, 2012) (compliance resolution), *available at* http://www.ed.gov/about/offices/list/ocr/docs/investigations/11072016-a.html ("Admissions officers indicated that under this system . . . race can be a plus factor in the admissions consideration for such applicants; for example, a White applicant who grew up in a neighborhood or school where he was one of few Whites and where most spoke English only as a second language.").

[16] Duke University, for example, expresses its interest in applicants expressing their identity in the application in the following way:

> Duke University seeks a talented, engaged student body that embodies the wide range of human experience; we believe that the diversity of our students makes our community stronger. If you'd like to share a perspective you bring or experiences you've had to help us understand you better—perhaps related to a community you belong to, your sexual orientation or gender identity, or your family or cultural background—we encourage you to do so. Real

Excluding race and ethnicity as the only parts of a student's life that cannot be considered in holistic review would deny these students the opportunity to relay their story of who they are and how they see and experience the world.

In the end, the collective story these examples tell is simple: While discrimination on the basis of race or ethnicity is proscribed by the Constitution, the Constitution does not require complete disregard of whether race has affected an individual's journey in life. If any one factor considered in an individual's application were removed, the individual would be different. It is a constellation of factors, not any one, that defines an individual applicant and drives an admission decision that is both educationally sound and consistent with this Court's precedent.

D. The Court should preserve decades of workable precedent associated with race-conscious practices that the higher education community has relied upon and integrated into their policies and practices.

Education leaders, including admissions officials, have endeavored to fulfill their institutional goals and to adhere to the principles first articulated by Justice Powell in *Bakke* and refined by *Grutter*, *Gratz*, and *Fisher I*. The strict scrutiny standard articulated by this Court associated with admissions has become an

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people are reading your application, and we want to do our best to understand and appreciate the real people applying to Duke.

Duke Univ., *2015-16 Duke Prompts*, http://admissions.duke.edu/application/instructions#essay-short-essay-prompts (last visited Oct. 23, 2015).

industry standard—to which educators nationwide consistently have turned in the development, articulation, and execution of such policies.[17] Given the evidence of reliance, investment, and practical application, there is no reason for this Court to overturn existing precedent. *See Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 854-55 (1992).

Amici are deeply engaged with admissions professionals and institutional leaders and have worked to provide institutions with practical tools and supports to comply with this Court's direction and to achieve their mission driven goals.

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[17] These initiatives are but a few that have centered on key policy design and practice elements implicated in this Court's strict scrutiny inquiry:

- Clear articulation of mission-related goals and policy rationales. E.g., COLL. BD., DIVERSITY BLUEPRINT (addressing key features of institutional missions and goals, along with key elements of model policies aligned with federal law).
- Establishment of rigorous analysis and careful consideration of race in holistic review. E.g., ADDAMS ET AL., *supra* (medical school guidance providing a flexible, modular framework and accompanying tools for aligning admission policies, processes, and criteria with institution-specific mission and goals).
- Rigorous pursuit and evaluation of race-neutral strategies. E.g., KEITH ET AL., *supra* (providing a policy development and evaluation guide, with numerous race-neutral models for consideration); COLL. BD., PLAYBOOK (providing a comprehensive and practical guide to inform race-neutral strategies and highlighting promising policies at 20 different institutions in line with *Fisher I* pronouncements).

CONCLUSION

For the foregoing reasons, and those in Respondents' brief, the judgment below should be affirmed.

Respectfully submitted,

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